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Supreme Court, U.S.
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No. 87-

IN THE

Supreme Court of the United States

October Term, 1987

GEORGE FAHMY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was the evidence at trial involving the structuring of cash deposits legally sufficient to establish Petitioner's guilt of the conspiracy to violate the currency reporting statute (31 U.S.C. 5313 et. *seq.*) and its regulations and to miscode brokerage house records?
2. Did a juror's medical difficulty provide just cause, within the meaning and spirit of Rule 23(b) of the Federal Rules of Criminal Procedure, for the trial court's summary discharge of the juror, and directing the return of a verdict from an eleven member jury?
3. Was the evidence at trial legally sufficient to establish that Petitioner knowingly obstructed justice at a time when a Grand Jury was probing the subject matter of certain disposed of Paine, Webber documents?
4. Did the trial Court err in failing to instruct the jury upon its need to find that Petitioner acted with specific intent in determining whether he obstructed justice as charged in Count 2 of the indictment?

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No. 87-

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner George Fahmy respectfully prays that a Writ of Certiorari be issued to review the order of the Court of Appeals for the Second Circuit entered in this case on or about April 12, 1988, which affirmed a judgment of the United States District Court, Southern District of New York (Cannella, J.) entered on December 4, 1987.

OPINIONS BELOW

A copy of the District Court's opinion denying Petitioner's motion to dismiss the indictment is officially reported at 672 F.Supp. 716 [S.D.N.Y. 1987] and is reproduced as Appendix A.

A copy of the decision of the Court of Appeals filed on April 12, 1988, is not officially reported, and is reproduced as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254. The petition for a writ of certiorari is filed within sixty (60) days of the Court of Appeals affirmance of the judgment of conviction. The mandate of the Court of Appeals was filed on May 10, 1988. The order appealed from unanimously affirmed a judgment of the

United States District Court, Southern District of New York (Cannella, J.) entered on December 4, 1987, convicting Petitioner of conspiracy (18 U.S.C. 371) and obstructing justice (18 U.S.C. 1503) and sentencing him to serve a term of five years probation and perform community service.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. 371. Conspiracy to commit offense or defraud United States

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 1503. Influencing or injuring officer or juror generally:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge old generally to ensure that Eder's accounts were processed properly and smoothlyn account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner or other committing magistrate in is person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication influences, obstructs or impedes, or endeavors to influence, obstruct or impede, the due administration of

justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 2 states:

(a) "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

31 U.S.C. 5311 Declaration of purpose:

It is the purpose of this subchapter (except section 5315) to require certain reports or records where they have a high degree of usefulness in criminal tax, or regulatory investigations or proceedings.

31 U.S.C. 5313 Reports on domestic coins and currency transactions:

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and donomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

(b) The Secretary may designate a domestic financial institution as an agent of the United States Government to receive a report under this section. However, the Secretary may designate a domestic financial institution that is not insured, chartered, examined, or registered as a domestic financial institution only if the institution consents. The Secretary may suspend or revoke a designation for a violation of this subchapter or a regulation under this subchapter (except a violation of section 5315 of this

title or a regulation prescribed under section 5513), section 411 of the National Housing Act (12 U.S.C. 1730d), or section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b).

(c)(1) A person (except a domestic financial institution designated under subsection (b) of this section) required to file a report under this section shall file the report—

(A) with the institution involved in the transaction if the institution was designated;

(B) in the way the Secretary prescribes when the institution was not designated; or

(C) with the Secretary.

(2) The Secretary shall prescribe—

(A) the filing procedure for a domestic financial institution designated under subsection (b) of this section; and

(B) the way the institution shall submit reports filed with it.

15 U.S.C. 78aq states:

(a)(1) Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered securities information processor, registered transfer agent, and registered clearing agency and the Municipal Securities Rule-making Board shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

(2) Every registered clearing agency shall also make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports, as the appropriate regulatory agency for such clearing agency, by rule, prescribes as necessary or appropriate for the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

(3) Every registered transfer agent shall also make and keep for prescribed periods such records, furnish such copies thereof, and make such reports as the appropriate regulatory agency for such transfer agent, by rule, prescribed as necessary or appropriate in furtherance of the purposes of section 78a-1 of this title.

Rule 23(b) of the Federal Rules of Criminal Procedure states:

"Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the Court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the Court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the Court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the Court a valid verdict may be returned by the remaining 11 jurors."

12 CFR 210.2(e) states:

(e) "Cash item" means:

(1) A check other than one classified as a noncash item under this section;

(2) Any other item payable on demand and collectible at par that the Reserve Bank of the District in which the item is payable is willing to accept as a cash item.

31 CFR 321.1(a) states:

"Cash payment means payment in currency, by check, or by credit to a checking, savings or share account."

31 CFR 103.22 states:

(a)(1) Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out

totalling more than $10,000 during any one business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.

STATEMENT OF THE CASE

Gary Eder, a Senior Vice-President at the mid-town Manhattan branch of Paine, Webber was a successful stock broker. In 1981, he earned $720,000; in 1982, he reached the one million dollar mark, and topped off in 1986 earning $2,600,000. Apparently one of the reasons for Eder's success was his willingness to structure cash deposits from his clients in such a way as to avoid triggering the filing of a currency transaction report (CTR).

Although the indictment in the case at bar commenced June 14, 1982, it was stipulated that Petitioner did not become affiliated with Paine, Webber as the branch manager[1] at Eder's branch until March 24, 1984.

The testimony at Petitioner's jury trial, viewed in the light most favorable to the Government revealed that Petitioner's predecessors, at the urging and direction of Gary Eder, who testified under a cooperation agreement with the Government, revealed that customer cash deposits were split up, and delayed to avoid triggering the CTR requirement. In addition, Eder also engaged in the practice of "miscoding" deposits. A deposit was miscoded when cash was received, but in the records sent to the downtown office, the customer's payment was listed as a check. However, the bank deposit slips accurately reflected the deposit into Paine, Webber's account as a "cash" deposit, and the records reflected cash. Only the customer statement listed the deposit as being in "check" form.

The testimony at trial revealed that some 16 months after becoming branch manager on perhaps two occasions in October, 1985, Eder gave Petitioner cash with directions to see that the cash blotter reflected the payments as "checks". In early 1985,

1. The position of branch manager involves overseeing the cashier's and margin areas, and supervising the back office employees.

Eder discussed two customer accounts, the Angerman and Hirschenbaum accounts with Petitioner. Eder was told that Petitioner was holding $200 so as not to exceed what he believed was the operative $10,000 reporting requirement. All of the aforementioned customer accounts were introduced in evidence. None reflected a breach of the CTR requirement. The only proof of Petitioner's conduct came from a Paine, Webber margin clerk Carmine Natale who testified that in the Autumn of 1986, he learned that one of Eder's customers delivered in excess of $10,000. Petitioner allegedly took the cash and gave Natale less than $10,000 to be deposited. No records reflecting this alleged occurrence were, however, introduced.

Eder's testimony also reflected that there came a point when he determined that it would be better if the branch's daily cash summaries for the period 1981-1983 were destroyed. Petitioner assisted Eder in removing these files from the Paine, Webber branch.

While it is true that there was a newspaper account of the entry of a guilty plea of one of Eder's garment district customer's Irwin Finer, the proof at trial failed to establish that there was an actual Grand Jury in the Southern District of New York seeking the documents which Eder and Petitioner disposed of. Rather, the stipulation which was read to the jury stated that at the time this conduct occurred, the Grand Jury subpoenas in question (Govt.'s Exh. 220, 221 and 223) were issued, a duly empanelled Grand Jury in the Southern District was conducting an inquiry into alleged violations of United States law. There was no further showing what that inquiry involved.

After the Government rested Petitioner rested calling substantive witnesses, and character witnesses. The Court charged the jury on the applicable law, but refused to give a specific intent charge with respect to the obstruction case as requested by Petitioner's trial counsel.

After the case went to the jury, during the course of its deliberations, one of the jurors telephoned the courtroom clerk that due to a high blood pressure condition he was unable to come to Court

that morning. Over the objection of both defense counsel, and without waiting to ascertain when the juror could return, the Court summarily discharged the juror and a verdict of guilty by an 11 person jury was ultimately returned.

On December 4, 1987, Petitioner was sentenced to serve a term of five years probation and perform community service.

REASON FOR GRANTING THE WRIT

I.

The Evidence Was Legally Insufficient To Sustain Petitioner's Conviction For Conspiracy To Violate The Currency Reporting Statute.

31 U.S.C. 5313 and the related regulations enacted thereunder (e.g. 31 CFR 103.22(a)) require financial institutions[2] to report currency transactions in excess of $10,000. As with any statutory scheme, there are loopholes and methods which enterprising individuals have devised to avoid triggering the financial reporting requirement. This case presents this Court with the opportunity to determine whether the engagement in the structuring of cash deposits, a practice not specifically proscribed by statute or Second Circuit opinion when performed, provides a basis for the use of the federal conspiracy statute to convict a salaried office manager.

Thus in *United States* v. *Anzalone*, 766 F.2d 676, 680-683 (1st Cir. 1985) the purchase of multiple bank checks in order to "structure" deposits into a stock brokerage concern in order to pay for bonds purchased to the account of the wife and mother of a public official. This structuring conduct, purposeful though it clearly was, did not violate the law.

In *United States* v. *Larson*, 796 F.2d 244, 246 (8th Cir. 1986), a unanimous Eight Circuit Court of Appeals reversed Appellant's condition based upon his engaging in structuring activities to

2. The secretary clearly could have drafted 31 CFR 103.22 to cover both the financial institution and other participants in a subject transaction (see *California Bankers* v. *Schultz*, 416 U.S. 21, 58, 69-70 n. 29; 94 S.Ct.1494, 1516, 1521 [1974]).

mask the cash nature of a $44,500 transaction. The Court held that the reporting statute imposed no duty, and Larson breached none, in structuring as he did.

Similarly, in *United States* v. *Espriella*, 781 F.2d 1432, 1435 [9th Cir. 1986] the Court, once again in the context or narcotics generated moneys, reversed both substantive and "371" conspiracies where structuring to avoid the $10,000 threshold were engaged in.

Finally, in *United States* v. *Gimbel*, 830 F.2d 621 [7th Cir. 1987] a unanimous Seventh Circuit reversed an attorney's conviction predicated upon his structuring of certain large deposits and withdrawals so that First Bank Milwaukee would fail to issue a CTR in connection with these transactions.

There is, concededly a conflict amongst the Circuits in this area. In *United States* v. *Heyman*, 794 F.2d 788 [2nd Cir. 1986], *cert.* den. 107 S.Ct. 585 (1987) the Second Circuit upheld the conviction of a Merril-Lynch employee who both opened up, and deposited less than $10,000 into these new accounts. Thus it was, we submit both the artificial creation of new Merril-Lynch accounts *and* his artificial depositing[3] into these accounts that created liability under 31 U.S.C. 5311 et. seq. for Heyman.

In *United States* v. *Nersesian*, 824 F.2d 1294, 1310-1315 [2nd Cir. 1987] the Court of Appeals dealt for the first time with the application of the general conspiracy statute (18 U.S.C. 371) to the conduct of Appellant Muktabi who utilized moneys generated by narcotics dealing to purchase money orders for deposit, and thereby avoid triggering the issuance of a CTR. It is based upon this use of the conspiracy statute that Petitioner was convicted under Count 1.

In reviewing the sufficiency of the evidence we concede, as we must, that the evidence must be reviewed in the light most favorable to the Government (*Glasser* v. *United States*, 315 U.S. 60, 80 [1942]). Nonetheless, the evidence must show that Petitioner knowingly joined the conspiracy. What is required is actual

3. It was Heyman who received the funds directly from the clients. In the case at bar Fahmy did not have client contact and only received the money by virtue of Paine-Webber's chain of command.

proof of an agreement. The proof at trial, we respectfully submit demonstrates something far less.

It is unquestioned that Gary Eder was involved in structuring transactions on behalf of his Paine, Webber customers from at least June 14, 1982, until December, 1986. However, Petitioner did not become "operations manager" at the Paine-Webber branch in question until March, 1984. It took some 16 months before he supposedly engaged in structuring type conduct in connection with the Angerman and Hirschenbaum brokerage accounts. We dispute that there was any competent or documentary proof that Petitioner ever engaged in conduct which prevented Paine-Webber, if it felt so inclined, to issue a CTR. We so contend because there was no proof that the apparent withholding of $200 by Petitioner prevented a CTR from being properly issued.

More specifically we note that the sole evidence on this score relates to Eder's sketchy recollection of a conversation with Petitioner relating to deposits into the Angerman, Hirschenbaum accounts and the remark that Fahmy was "holding" $200 on each account to avoid triggering the CTR requirement.[4] A review of these account records shows however that the setting aside, or withholding of this sum did not prevent a CTR from being filed by Paine, Webber.[5]

The mere fact that one engages in conduct which assists others to violate the law does not support the conclusion that they thereby become members of a charged conspiracy. Rather, there must be proof that there was an agreement reached reflecting a meeting of the minds (*United States* v. *Rosenbaltt*, 554 F.2d 36, 38 [2nd Cir. 1977]). Put another way, not all associational conduct taken together is sufficient to implicate one as a co-conspirator (*United States* v. *DiStefano*, 555 F.2d 1094 [2nd

4. This must be viewed against the backdrop of the Government's concession that June, 1984, was the last time when Eder received more than $10,000 at one time (316) and the inability of the cashier Carmine Natalie to point to transactions reflecting a breach of the reporting requirements (754-755).

5. Fahmy's remark was based upon his erroneous belief that a CTR was required to be filed if $10,000 was received in a 7 day period. In fact, the $10,000 threshold is a daily requirement not weekly.

Cir. 1977]; *United States* v. *Soto*, 716 F.2d 989 [2nd Cir. 1983]; *United States* v. *Penagos*, 823 F.2d 346 [9th Cir. 1987]).

The fact that a defendant may believe he has acted in a particular way is not proof that in the complex world of financial deposits, that he has done so. The fact that Petitioner erroneously thought he had violated the law, when in truth, he had not, militates against a finding of membership in a conspiratory—the charged object of which is to prevent one's employer from issuing a CTR.

Finally, we question whether it can truly be said that Petitioner was on notice that the structuring of transactions was unlawful.[6] Had Petitioner been assigned to a Paine, Webber branch located in the geographic confine of the First, Seventh or Ninth Circuits, he would not be Petitioning this Court today by virtue of the decisions referred to at the beginning of this point. Indeed, up through at least as early as March, 1985, Judge Whitman Knapp's opinion in *United States* v. *Goldberg*, 587 F.2d 302 [S.D.N.Y. 5/21/84] rev'd 756 F.2d 949 [2nd Cir. 3/6/85] upheld the practice of structuring at least in New York City. Indeed it was not until the Summer of 1986, when Judge Kaufman's opinion in *United States* v. *Heyman, supra*, was released that the law in this Circuit prohibiting the practice of structuring transactions[7] was articulated.

Mindful that the criminal law may only penalize conduct which Defendant's have clear notice of, it cannot we respectfully submit, be said that Petitioner could be said to be on notice of what structuring practice the currency laws did not permit particularly where CFR requirements and not United States Code provisions are implicated. To hold him accountable under such clouded circumstances is contrary to accepted notions of fair

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6. The practice of structuring cash transactions was not explicitly rendered unlawful by the congress until the enactment of the Money Laundering Control Act of 1986, P.L. 99-570.

7. Neither the statute nor CFR provision in question specifically mention structuring as a prohibited practice.

notice[8] and reduces the enforcement of the criminal law to a trap for the unwary (c.f. *United States* v. *Critzer*, 49 8 F.2d 1160, 1162 [4th Cir. 1974]; *United States* v. *Dahlstrom*, 713 F.2d 1423, 1426-1429 [9th Cir. 1983] *cert.* den. 466 U.S. 980 [1984]; *United States* v. *Risk*,[9] 672 F.Supp. 346, 357 [S.D. Ind. 1987] aff'd 843 F.2d 1059, 1062 [7th Cir. 1988 per Bauer, C.J.]; *United States* v. *Tana*, 618 F.Supp. 1393, 1395 [S.D.N.Y. 1985]; *United States* v. *Lee*, 667 F.Supp. 1410-1404 [D. Col. 1987]). We call upon this Court to grant this petition to reconcile this clear conflict between the Courts. It is, we respectfully submit, unseemly to have one's criminal exposure turn upon the happenstance of where he works or lives.

The second alleged improper record creation activity forming the basis of the conspiracy charged related to the alleged miscoding of Paine, Webber "blotter records" to record cash received as checks. The fact of course was that the records which went down to Paine, Webber's central record center, coupled with the actual and completely accurate bank deposit slips, and further subsequently supplemented by the monthly bank statements, were not miscoded. Rather, the miscoding such as it existed was in actuality a "financial placebo" which merely carried an inaccurate description of a given deposit on the customer's monthly statement. The "hard copy" downtown, accurately reflected the actual nature of payment received up at Eder's branch.

17 CFR 240.17a-3 by definition defines "cash" as consisting of both "currency" and "checks". The mere fact that Paine, Webber as a matter of internal business policy may have instituted a procedure to have a blotter notation made differentiating between currency and check deposits, which concededly was breached in

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8. See e.g., *Lanzetta* v. *United States*, 306 U.S. 451, 453 [1939]; *Papachristou* v. *City of Jacksonville*, 4 05 U.S. 156, 92 S.Ct. 839 ; *Colauti* v. *Franklin*, 439 U.S. 379, 99 S.Ct. 675 [1979]).

9. District Judge Barker's opinion dealing specifically with the impact of conflicting case law is, we respectfully submit, particularly pertinent to Petitioner's case. If judges of the Court of Appeals and District Court disagree over what methods may or may not trigger a CTR what type of real guidance does this provide for George Fahmy from Bergen Beach in Brooklyn to guide his conduct?

the case at bar, does not support a violation of the record-keeping act.

Our research does not reveal a criminal case from this Court dealing with what type of specificity must be achieved in order to conform statutorily (c.f. *United States* v. *Sloan*,[10] 389 F.Supp. 526 [S.D.N.Y. 1976]). Under these circumstances to bottom a conspiracy charge upon a claim of "miscoding", in the face of proof that the coding practices in the cashier's cage were in conformity with 17 CFR 240.17a-3 and hence were literally true (*Bronston* v. *United States*, 409 U.S. 352, 93 S.Ct. 595) is improper, and unacceptable.

At a time when the volume of customer transactions is high, the securities industry requires specific guidance from this Court in order to ascertain the demarcation point between careless record keeping and criminal exposure, and the specific type of brokerage house records which fall within the ambit of criminal prosecution.

II.

The Trial Court Erred And Denied Petitioner A Fair Trial By Discharging A Juror During Deliberations And Requiring The Rendition Of A Verdict By An 11 Member Jury Over Strenuous Defense Objections In Violation Of The Requirements Of Rule 23(b) Of The Rules Of Criminal Procedure.

Petitioner's trial was not a long one. The testimony went in over the course of six days. It was, against this backdrop, and the requirements of Rule 23(b) of the Federal Rules of Criminal Procedure that Judge Cannella's decision to discharge a juror, during the course of deliberation, must be reviewed.

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10. In *Sloan* a record keeping conviction was sustained where records were not kept because they were false. In this case there is no contention that the total of receivables at the Paine, Webber cashier's cage was overstated or mistotaled. Rather the manner of internal apportionment is the crux of the Government's miscoding claim.

As the notes of the Advisory Committee on Rules which drafted Rule 23(b) noted at the time the Rule was adopted, that the Rule:

> "[A]ddresses a situation which does not occur with great frequency but which, when it does occur, may present a most difficult issue concerning the fair and efficient administration of justice. This situation is that in which, after the jury has retired to consider its verdict and any alternate jurors have been discharged one of the jurors is seriously incapacitated or otherwise found to be unable to continue service on the jury. The problem is acute when the trial has been a lengthy one and con-sequently the remedy of mistrial would necessitate a second expenditure of substantial prosecution, defense and court resources."

Mindful that proceeding to a verdict in a federal felony case with a jury of less than 12 persons is at variance with common law, the use of Rule 23(b) for non-consentual 11 person juries was clearly not intended to be effectuated lightly. Indeed, the experience of the *nisi prius* courts bears this posture, and the preference for 12 person juries out.

In *United States* v. *Gambino*, 598 F.Supp. 646, 658 [D.N.J. 1984], Judge Lacey was confronted with a multi-defendant narcotics case which encompassed some six weeks of trial testimony. At the time the juror Mr. Ojada was disqualified,[11] the jury had deliberated for some 20 hours. All of the attorneys except one agreed under these circumstances to accept an 11 jury verdict. The Defendant most directly affected did not want the court to declare a mistrial. Under such circumstances, the District Court understandably found the existance of factors sufficient to apply Rule 23(b) even in the absence of consent from all parties.

In *United States* v. *Smith*, 619 F.Supp. 1441, 1451 [W.D. Pa. 1985] the applicability of Rule 23(b) arose in the context of a three month trial involving a 16 count indictment charging public corruption (mail fraud, travel act) in Allegheny County, Pennsylvania. The jury was already on the morning of the fourth day

11. The juror was removed for a reason other than a health problem or illness.

of its deliberations when a sitting juror suffered very serious injuries as a result of an automobile accident which rendered participation in jury deliberations impossible, not merely for a matter of a few days, but rather several months. Under these circumstances, Judge Muir, we submit, followed the spirit of Rule 23(b) and directed the jury to continue to deliberate to verdict.

Concededly, when the Court of Appeals had occasion in *United States* v. *Stratton*, 779 F.2d 820, 830 (2nd Cir. 1985) *cert.* den. 106 S.Ct. 2285 [1986] to apply the Rule, it chose not to reverse the conviction where an 11 person jury rendered the verdict. As with any appeal dealing with the application of Rule 23(b) the varied nature of problems which trial judges must cope impacts upon whether it can be said that discretion has been abused. It must, we submit, be fairly noted that the trial judge was confronted by a 4½ day hiatus, during deliberation following a lengthy trial prompted by a juror's unavailability due to religious observances.

We do not contend that a trial judge is powerless to utilize Rule 23(b) where unequivocal[12] unavailability for a period of 4½ days. However, in the case at bar the Court never, we submit, ascertained whether the juror's health problem was permanent or temporary—nor if temporary when the juror could be expected to resume participation in the verdict rendering process.

Were the record on this subject capable of supporting a judicial choice between temporary delay or judicially declared mistrial versus a re-trial of a relative short case, this Court might well be inclined to accept Judge Cannella's determination. However, the record is all too clear that he failed to both properly ascertain, and balance the nature and permanence of the delay occasioned versus the length of trial. The Court simply, and we submit impetuously, permitted extra-judicial concerns to distort the neutral application of the Rule 23(b) balancing test.

Under such circumstances we believe discretion was abused, a valuable juror was expelled, and Petitioner had a verdict entered by a body 1/12 of its expected size. Unless this Court believes

12. Due to the length of the religious high holiday.

that "convenience" and "expedition" constitute "good cause", the writ should be granted to permit this Court to provide guidance for the application of Rule 23(b).

III.

The Evidence At Trial Was Legally Insufficient To Demonstrate The Existence Of A Grand Jury Probing Currency Reporting Compliance At Paine Webber.

Petitioner was charged in Count 2 of the indictment with obstructing justice in violation of 18 U.S.C. 1503 in connection with his role is assisting Gary Eder remove Paine, Webber daily cash summary folders. Where, as here, the contention is that the destruction of documents was calculated to deprive the Grand Jury of evidence, the Government must still establish that a particular Grand Jury was actually impanelled and inquiring into matters about which the documents in question directly related (*United States* v. *Solow*, 138 F.Supp. 812, 816 [S.D.N.Y. 1956, per Weinfeld, J.]) as a pre-requisite to conviction.

This follows since the mere act of disposing of the files in question, putting aside questions of ethics and morality, does not violate section 1503. Rather two key factual elements must be competently established:

1. the existence of a pending judicial or Grand Jury investigation;

2. Defendant's knowledge of the existence of the judicial proceeding or Grand Jury investigation;[13]

3. intentional engagement in conduct reasonably calculated to deprive the Court or Grand Jury of testimony or physical evidence.

See e.g., *United States* v. *Capo*, 791 F.2d 1054, 1070 [2nd Cir. 1986], *United States* v. *Vesich*, 742 F.2d 451, 454 [5th Cir. 1984]).

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[13] We concede as we must that the Court of Appeals in *United States* v. *Aguilo*, 782 F.2d 358, 360 [2nd Cir. 1986] has dispensed with requiring the United States Attorney to prove that the Grand Jury was Federal in nature.

At the point in time when the Government rested its case there was, we respectfully submit clearly insufficient evidence in the trial record to establish a *prima facie* violation of Section 1503. There was no proof that Petitioner knew that the documents he assisted Eder in removing from the premises were called for by Grand Jury subpoena and were to be disposed of (see *United States* v. *Williams*, 470 F.2d 1339, 1341-42 [8th Cir. 1973]).

The fact that the files which Gary Eder disposed of would, with the benefit of hindsight have assisted a Grand Jury investigation is not, we respectfully submit, dispositive. Rather, there must be proof that Petitioner assisted Gary Eder with the *mens rea* called for in Section 1503 knowing that a Grand Jury panel was actually probing matters related to these files.

Because we submit that there was no such evidence in the trial record, we submit, that the judgment appealed from must be modified by dismissing Count 2. At the very least, this Court should grant the Writ of Certiorari to definitively speak to the modicum of proof necessary to establish a violation of Section 1503.

IV.

The Trial Court's Omission Of Specific Intent Language In Its Charge In Connection With Count Two And The Court's Instruction Concerning The Records Subject To Miscoding Were Erroneous And Lessened The Government's Burden Of Proof Denying Petitioner A Fair Trial.

Prior to summation a "charge conference" was held to review the request to charge of the respective parties. Petitioner's trial counsel stressed the importance of instructing the jury upon the Government's obligation to competently establish that Fahmy acted with the specific intent to obstruct the due administration of

justice (T: 1061-1068; A-343-350). This request was memorialized in Defendant's request to charge #37.[14]

During the course of its charge, Judge Cannella did instruct the jury on the need to find specific intent, but when it came time to instruct with regard to the intent requirement, the Court charged the jury that it need only find corrupt intent. There is, we respectfully submit a distinction between what a lay jury may view and find to be corrupt, and conduct which is engaged in with specific intent to obstruct the due administration of justice.

That Defendant's request #37 was a correct request is beyond cavil (see *United States* v. *Moon*, 718 F.2d 1210, 1236 [2nd Cir. 1983]; *Pettibone* v. *United States*, 148 U.S. 197, 13 S.Ct. 542 [1893]). Violations of Sec. 1503 require proof of a specific intent to obstruct justice (*United States* v. *Ryan*, 455 F.2d 728, 734-35 [9th Cir. 1971]; *United States* v. *Carleo*, 576 F.2d 846, 849 [10th Cir. 1978]). Nor can it be gainsaid that counsel called to Judge Cannella's attention his failure to so charge at the appropriate point following the completion of the rendition of the Court's charge (A-300).

Mindful that a defendant has an absolute to have the trial court instruct the jury upon its theory of defense Barnes *v. Jones*, 665 F.2d 427, 435 [2nd Cir. 1981]; *United States* v. *Williams*, 728 F.2d 1402, 1404 [11th Cir. 1984] rev'd other grds 103 S.Ct. 3308. We submit that the trial court's omission of a vital intent requirement cannot be brushed off as mere harmless error (e.g.,

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14. Request #37 states:

> *Specific Intent*—The crime of obstruction of justice is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposefully intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.
>
> An act is "knowingly done", if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.
>
> E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions*, Sec. 14.03.

United States v. *Lane*, 474 U.S. 438, 106 S.Ct. 725 [1986]; *Satterwhite* v. *Texas*, _____ U.S. _____ [No. 86-6284]).

In addition, the Court was obliged to instruct the jury on the nature and duty of the brokerage house records which were the subject of the miscoding charge alleged as an object of the conspiracy charged in Count I. In this regard the jury was told:

> "[I] instruct you it does not matter whether or not Paine, Webber was required to distinguish in its records between cash payments by customers and check payments by customers.
>
> As long as Paine, Webber's practice was to distinguish between cash payments and check payments, it is illegal for someone to cause Paine, Webber to record that information inaccurately, to so-call miscode it." (1047; A-329).

This instruction essentially parrotted Government request to charge #8.

Under this charge a jury could find that an accused violated a federal penal statute for preparing or causing the preparation of a document or mere internal record peculiar to a particular brokerage house (c.f. *Sinclair* v. *United States*, 444 F.2d 399 [2nd Cir. 1971]). We respectively submit that there is more than something contrary to accepted notions of law to permit a violation of a record keeping section (e.g. 15 U.S.C. 78q without specifying what type of records must be kept and maintained under the penalty of perjury.

Only the Congress has the power, we respectfully submit, to enact penal statutes. Under the Court's charge to this jury a conviction was allowed to be returned in connection with a type of record neither required to be kept nor which many institutions may not in fact keep. Accordingly, the consequence is that under Judge Cannella's charge it was in actuality Paine, Webber which has written the statute, to permit a conviction under such circumstances is, we submit, erroneous and a violation of Petitioner's due process rights. At the very least this Court should grant the Writ of Certiorari to explore the due process consideration of an elastic

intermediate appellate holding which in effect allows brokerage houses, and not the duly elected Congress of the United States to write the federal black letter criminal law. Such an implicit delegation of power raises serious constitutional concerns and, we respectfully submit, requires review by this Court.

CONCLUSION

The Petition For A Writ Of Certiorari Should Be Granted.

Dated: New York, New York
June 10, 1988

Respectfully submitted,

ROGER BENNET ALDER, P.C.
Attorney for Petitioner
225 Broadway
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(212) 406-0181

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America

—against—

JOSEPH P. TOTA AND
GEORGE B. FAHMY,

Defendants.

MEMORANDUM AND ORDER

§§ 87 Cr. 273

CANNELLA, D.J.:

Defendants' motion to dismiss the indictment is denied. Fed. R. Crim. P. 12(b).

BACKGROUND

On April 2, 1987, Joseph P. Tota and George B. Fahmy, former employees of the brokerage firm of Paine, Webber, Jackson & Curtis ("Paine, Webber"), were named in a two-count indictment alleging conspiracy to defraud the United States and obstruction of justice. These charges stemmed from defendants' activities as branch manager and operations manager, respectively, of Paine, Webber branch office in midtown Manhattan. Superceding indictments were returned on May 12 and July 7.

Tota began working as branch manager in June 1982. Fahmy began working as operations manager at the same branch office in March 1984. Gary Eder was a broker in the branch office and is named in the indictment as a conspirator, along with Tota and Fahmy. On March 19, 1987, Eder pled guilty before Judge Edmund L. Palmieri to one count of conspiring to defraud the United States, in violation of 18 U.S.C. § 371, and to one count of willfully causing Paine, Webber to fail to make and maintain

certain financial records, in violation of 15 U.S.C. § 78q(a). United States v. Eder, 87 Cr. 196 (ELP).

The indictment describes a scheme whereby Eder received lump-sum cash payments from Paine, Webber customers, in amounts up to $72,000, for deposit into their accounts. Eder then broke down the payments into sums of less than $10,000 for (1) deposit into a customer's account on different days; (2) deposit on the same day into different accounts controlled by the same customer; and (3) purchase of bank checks in an amount less than $10,000 for deposit, along with cash into a customer's account. As discussed more fully below, the indictment alleges that Eder, Tota and Fahmy conspired to "structure" these transactions in order to circumvent federal statutes and regulations requiring financial institutions to file reports of currency transactions, involving more than $10,000. Tota and Fahmy are also charged with conspiring with Eder to aid and abet violations of the reporting statutes by Paine, Webber.

DISCUSSION

A. The Indictment and Defendants' Motion to Dismiss

Count one of the indictment alleges a conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. The conspiracy allegedly had five objects: (1) to defraud the United States by impeding, impairing, obstructing and defeating the Government's efforts to collect data on currency transactions, Indictment ¶ 5; (2) to cause Paine, Webber to fail to file reports of currency and other payments and transfers through and to such financial institution, involving a transaction in currency of more than $10,000, as part of a pattern of transactions involving more than $100,000 in a 12-month period, in violation of 31 U.S.C. § 5313(a) and regulations promulgated thereunder, 31 C.F.R. § 103.22, *id.* ¶ 6; (3) to cause Paine, Webber to fail to file reports of deposits of currency and other payments and transfers through and to such financial institution, involving a transaction in currency of more than $10,000, also in violation of 31 U.S.C. § 5313(a) and 31 C.F.R. § 103.22, *id.* ¶ 7; (4) to cause Paine, Webber to fail to

make and keep certain records of financial transactions, in violation of 15 U.S.C. § 78q(a) and 17 C.F.R. §§ 240.17a-3, 240.17a-4 and 240.17a-8, *id.* ¶ 8; and (5) to obstruct justice by destroying certain records during a grand jury investigation, in violation of 18 U.S.C. §1503, *id.* ¶ 9. Count two of the indictment charges obstruction of justice in violation of 18 U.S.C. § 1503 and 18 U.S.C. § 2.[1]

Tota moves to dismiss the entire indictment, claiming that (1) the conspiracy count does not charge a crime under 31 U.S.C. § 5313, or in the alternative, that § 5313 is unconstitutional as applied to defendants; (2) the securities record-keeping object of the conspiracy count must be dismissed because Paine, Webber was not required to keep the information allegedly falsified; and (3) the obstruction of justice object of the conspiracy count and the substantive obstruction of justice charge in count two are legally insufficient. Fahmy joins in the motion, except with respect to the obstruction of justice allegations in both counts.

B. The Currency Transaction Reporting Requirements

The Currency and Foreign Transactions Reporting Act, 31 U.S.C. §§ 5311-5322 ["the Act"], requires domestic financial institutions to make and maintain "certain reports or records [which] have a high degree of usefulness in criminal tax, or regulatory investigations or proceedings." *Id.* § 5311. Section 5313(a) of the Act provides:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency . . . in an amount, denomination, or . . . under any circumstances the Secretary prescribes by regulation, the institution and any other participant in

1. 18 U.S.C. § 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

> the transactions the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

31 U.S.C. § 5313(a). Criminal penalties for willful violations of the statute and regulations promulgated thereunder are set forth in 31 U.S.C. § 5322.

Pursuant to the above grant of authority, the Treasury Department issued the following regulation:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

31 C.F.R. § 103.22(a) (1984).

Treasury regulations define a "transaction in currency" to be a "transaction involving the physical transfer of currency from one person to another." *Id.* § 103.11. The report called for in the regulations is known as a "Form 4789, Currency Transaction Report" ["CTR"]. It is well established that only financial institutions are required to file CTRs for transactions involving more than $10,000. *See* California Bankers Ass'n v. Shultz, 416 U.S. 21, 58 (1974).

C. Defendants' Challenge to the Reporting Requirements

Defendants challenge the legal sufficiency of the CTR-related objects of the conspiracy count on two grounds. First, they argue that they may not be charged with conspiring to cause Paine, Webber to fail to file CTRs because Paine, Webber was under no duty to file CTRs for the type of "structured" transactions alleged in the indictment. Second, defendants argue that even if Paine, Webber was required to file CTRs for the transactions, the reporting statutes are unconstitutional as applied because they did not give fair notice that structuring transactions in the manner alleged was unlawful.

1. Structured Transactions Under the Act

Defendants first argue that the CTR-related objects in the indictment's conspiracy count are legally insufficient because 31 U.S.C. § 5313 does not specifically prohibit the type of "structured" transactions alleged to have taken place. Defendants contend that Paine, Webber was never under any legal obligations to file CTRs because no "deposit" to a Paine, Webber customer's account ever exceeded $10,000 in a single day. *See* Memorandum of Law In Support of Defendant's Motion to Dismiss the Indictment at 11-16, 87 Cr. 273 (JMC) (S.D.N.Y. June 19, 1987) ["Defendant's Memorandum"]. The thrust of their argument is that structuring transactions, so that the total deposit to a customer's account in a single day is less than $10,000, is not prohibited by the Act.

In support of this argument, defendants rely upon a series of decisions in the First, Eighth and Nine Circuits in which convictions of bank customers for violating 31 U.S.C. § 5313, were reversed. *See, e.g.*, United States v. Larson, 796 F.2d 244, 246 (8th Cir. 1986); United States v. Dela Espriella, 781 F.2d 1432, 1435 (9th Cir. 1986); United States v. Varbel, 780 F.2d 758, 760-63 (9th Cir. 1986); United States v. Anzalone, 766 F.2d 676, 680-83 (1st Cir. 1985); *see also* United States v. Gimbel, No. 86-1808, slip op. at 8 (7th Cir. Aug. 6, 1987). Defendants acknowledge, however, that several other circuits have upheld the application of § 5313 to individuals, if they willfully structured their transactions so as to cause the financial institution to fail to file the appropriate CTR. *See, e.g.*, United States v. Giancola, 783 F.2d 1549, 1551-52 (11th Cir.), *rehg. denied*, 797 F.2d 982 (*en banc*), *cert. denied*, denied, 107 S. Ct. 669 (1986); United States v. Cook, 745 F.2d 1311, 1315 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1205 (1985) United States v. Puerto, 730 F.2d 627, 632-33 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 162 (1985); United States v. Tobon-Builes, 706 F.2d 1092, 1098-99 (11th Cir. 1983) (customer); United States v. Thompson, 603 F.2d 1200, 1203-04 (5th Cir. 1979); United States v. Shearson, Lehman Bros., Inc., 650 F. Supp. 490, 493-98 (E.D. Pa. 1986) (customers of banks

and employees of brokerage firm); United States v. Richter, 610 F. Supp. 480, 487-90 (D.C. Ill. 1985), *aff'd sub nom.* United States v. Konstantinov, 793 F.2d 1296 (7th Cir.), *cert. denied*, 107 S. Ct. 191 (1986) (customers); United States v. Konefal, 566 F. Supp. 698, 701-02 (N.D.N.Y. 1983) (customers).

In the Second Circuit, an individual, although under no legal duty himself to file a CTR, nevertheless can be held criminally liable for willfully causing a financial institution to fail to file a currency report which it has a legal duty to file. *See* United States v. Heyman, 794 F.2d 788 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 585 (1987); *see also* United States v. Nersesian, No. 86-1211, slip op. at 4092 (2d Cir. June 29, 1987).

Heyman involved a Merrill Lynch employee who received lump-sums of cash from his customers in amounts exceeding $10,000. He then structured the transactions by opening several different accounts and making deposits of less than $10,000 into each of them. In upholding Heyman's conviction under 31 U.S.C. § 5313 and 18 U.S.C. § 2(b), for willfully causing Merrill Lynch to fail to file the appropriate CTRs, the court stated that "[h]ad Merrill Lynch, a financial institution, structured the transactions as Heyman did, it would have violated federal law." 794 F.2d at 791.

This Court finds *Heyman*, rather than the cases cited by defendants, dispositive. First, the *Anzalone* line of cases are inapposite to the facts in this case. Essentially, these cases hold that because bank customers are under no obligation to disclose the nature of their own structured transactions, they may not be prosecuted for causing a financial institution to fail to file the appropriate CTRs. *See, e.g., Anzalone*, 766 F.2d at 682; *Larson*, 796 F.2d at 246. The Second Circuit in *Heyman*, however, has specifically rejected this approach, stating that through the application of 18 U.S.C. § 2, "any individual, including a customer, may be held criminally liable for willfully causing a financial institution to fail to file [required] CTRs." 794 F.2d at 792; *see Nersesian*, slip op. at 4095 ("Under 18 U.S.C. § 2(b), a bank

customer has a duty not to willfully cause a bank to violate [31 U.S.C. § 5313."].

Furthermore the facts in *Heyman* are closely analogous to those in the instant case. Heyman was not a customer, but an employee of Merrill Lynch when he received cash sums from Merrill Lynch customers in amounts exceeding $10,000. He then structured each transaction by breaking up the payment and making separate deposits during the Course of a single day, or by opening new accounts and later transferring the funds into a pre-existing account. In the instant case, the indictment alleges that Eder received lump-sum cash amounts from Paine, Webber customers in amounts ranging from $25,100 to $72,000. *See* Indictment ¶¶ 10(a), 11(1), 11(4), 11(7). Eder then broke down the lump-sum amount into smaller amounts of less than $10,000 and either made deposits into the same account over the course of several days, or made deposits on a single day into different accounts controlled by the same person. Contrary to defendants' assertions, *see* Defendants' Memorandum at 24, the latter type of structured transaction would appear to fall within the scope of § 5313. *Heyman* specifically stated that a financial institution "would [be] required to file a CTR for cumulative deposits in a single day." 794 F.2d at 792. Thus, if a customer gives an employee of a financial institution a lump-sum of cash exceeding $10,000 in a single day, for deposit into several pre-existing accounts all under the customer's control, *Heyman* would appear to indicate that the CTR filing requirement is triggered. *See id.* Once again, the focus is on the initial exchange of funds between a customer and the financial institution's representative.

Defendants stress the fact that the structured transactions in *Heyman* resulted in total, single day deposits which exceeded $10,000. While it is true that several of the transactions in *Heyman* were structured, and the smaller amounts deposited, in a single day, it is far from clear that the structured transactions alleged in the indictment are outside the scope of § 5313. As stated above, in the Court's view, *Heyman* focused on the initial

exchange of funds between the Merrill Lynch customer and Heyman involving more than $10,000.[2] Because the funds were destined to be deposited in the customer's Merrill Lynch account, the CTR filing requirement was triggered. But for Heyman's structuring of the transaction for the purpose of evading the filing requirement, Merrill Lynch would have filed the appropriate CTR. Accordingly, Heyman caused Merrill Lynch to fail to file the CTRs and was, therefore, subject to the criminal penalties found in 31 U.S.C. § 5322.

The indictment here alleges that, on at least three occasions, Eder received lump-sums of cash from a Paine, Webber customer in excess of $10,000. These sums were then broken down and deposited into the same account, or into different accounts controlled by the same customer. Tota used part of the cash sums to purchase bank checks which were deposited, along with the remaining cash, into the customer's account. Using *Heyman* as a guide, the Court sees little difficulty in classifying the "physical transfer of currency," 31 C.F.R. § 103.11 (defining "transaction in currency,"), from a Paine, Webber customer to Eder, on a single occasion and in an amount exceeding $10,000, as a "deposit, ... of currency or other payment or transfer, by, through, or to [Paine, Webber], which involve[d] a transaction in currency of more than $10,000." 31 C.F.R. § 103.22(a).

Defendants also argue that a financial institution's duty to file a CTR only arises when an actual "deposit" or credit is posted to a customer's account. *See* Defendant's Memorandum at 25-30. This argument is without merit. 31 C.F.R. § 103.22(a) requires

2. Defendants' argument that only single day structured transactions can form the basis for prosecution under § 5313 is further undermined by one of the transactions which formed the basis for Heyman's prosecution. On one day, Heyman received $19,000 from Henry and Carolyn Cohen. He then deposited $9,500 into a pre-existing joint account and created a new account in the name of Henry Cohen, into which he deposited the remaining $9,500. No CTR was filed by Merrill Lynch. On the following day, Heyman transferred the $9,500 from Henry Cohen's account into the joint account, the "net effect being a deposit of $19,000 into the joint Cohen account." 794 F.2d at 790 n.3. Obviously, the court in *Heyman* considered this to be a single transaction representing the transfer of $19,000 from the Cohens into their joint account, despite the structuring by Heyman that obviated the filing by Merrill Lynch of a CTR.

a financial institution to file a CTR whenever "a deposit, withdrawal, exchange of currency or *other payment or transfer, by, through, or to* such financial institution, which involves a transaction in currency of more than $10,000" is made (emphasis added). Defendants ignore the underscored language and focus exclusively on the term "deposit." Although in a strict banking sense, a "deposit" to a customer's account may not be technically complete until that account is actually credited, when a customer of a financial institution delivers to an officer of that institution a sum in excess of $10,000 for deposit into an account under his control, a "payment or transfer, by, through, or to such financial institution" has occurred. *See* United States v. *Bank of New England, N.A.*, 640 F. Supp. 36, 39 (D. Mass. 1986) ("No amount of bankerly vocabulary, however, can conjure away the regulations' explicit equation of 'transaction in,' and 'physical transfer of,' currency."). Any other interpretation would enable an employee of a financial institution to flout the CTR filing requirements with impunity by acting as a "structuring" intermediary between a customer seeking to avoid detection of large cash deposits and the financial institution itself, the latter of which is under the legal duty to report such deposits.

2. Constitutionality

Defendants' second argument regarding the CTR objects in the conspiracy count is that, even assuming that Paine, Webber was under a duty to file CTRs for the transactions alleged in the indictment, the statutes and regulations are unconstitutional because they fail to give adequate notice of the criminality of structuring the transactions in the manner alleged. This same argument was raised and rejected in *Heyman*, which stated that "the requirement . . . that a defendant's acts be 'willfull' provides adequate protection for individuals who might unwillingly stumble into a violation of federal law." 794 F.2d at 792 (citing Village of Hoffman Estates v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 342 (1952)); *see* United States v. *$359,000*

in United States Currency, No. 86-6237, slip op. at 5097-98 (2d Cir. Sept. 8, 1987); United States v. Granda, 565 F.2d 922, 926 (5th Cir. 1978) (The term "*willful* [in § 5313] require[s] proof of the defendant's knowledge and specific intent to commit the crime."); United States v. Shearson Lehman Bros., Inc., 650 F.Supp. at 1202-03; United States v. Richter, 610 F. Supp. at 490.[3]

Moreover, "to be held under the broad sweep of the fraud prong of § 371, [a defendant] need not have agreed to commit, or have actually committed, a specific substantive offense. They merely must have agreed to interfere with or to obstruct one of the government's lawful functions." *Nersesian*, slip op. at 4097 (citing United States v. Southland Corp., 760 F.2d 1366, 1382 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 88 (1986).

C. Record Keeping Provisions of the Securities Laws.

Defendants are also charged with conspiring to violate § 17(a) of the Securities Exchange Act, 15 U.S.C. § 78q(a), by causing Paine, Webber to (1) create false records, which reflected deposits of cash as deposits of checks; (2) cause Paine, Webber to fail to file CTRs as required; and (3) cause Paine, Webber to fail to preserve certain records of financial transactions required to be maintained for a period of time by members of a national securities exchange. Defendants contend that, although the "essence" of this charge is that certain cash deposits were deliberately miscoded as check deposits, such conduct is not prohibited by § 17(a) of the Exchange Act. Defendants further contend that

3. Defendants also argue that the charge of conspiring to defraud the United States by causing Paine, Webber to violate the CTR laws can only be maintained if Paine, Webber was under a duty to file CTRs which went unfulfilled. In light of the Court's ruling above, this argument is without significance. Of course, it is a fundamental maxim of conspiracy law that an individual may be charged in a conspiracy to violate federal law even if the substantive offense which was the object of the conspiracy was not committed. *See Pinkerton* v. *United States*, 328 U.S.640, 643 (1946) ("It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses.").

if such conduct does violate § 17(a), then the statute and regulations promulgated thereunder are unconstitutional as applied to them.

Section 17(a) of the Exchange Act mandates that institutions like Paine, Webber "shall make and keep for a prescribed period such records . . . as the Commission, by rule, prescribes as necessary or appropriate." 15 U.S.C. § 78q(a). Section 32 of the Exchange Act provides criminal penalties for "[a]ny person who willfully violates any provision of this title . . ., or any rule thereunder." 15 U.S.C. § 78ff.

Pursuant to this authority, the SEC promulgated regulations, which read in relevant part:

> (a) Every member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange . . . small make and keep current the following books and records relating to his business:
>
> > (1) Blotters (or other records of original entry) containing an itemized daily record of . . . all receipts and disbursements of cash and all other debits and credits.

17 C.F.R. § 240.17a-3(a)(1). In addition, 17 C.F.R. § 240.17a-8 requires that financial institutions subject to the Currency and Foreign transactions Reporting Act "shall comply with the reporting, record-keeping and record retention requirements of Part 103 of Title 31 of the Code of Federal Regulations." Records required under § 24.17a-3 are required to be kept for "not less than 6 years," *id.* § 240.17a-4(a), and records required under § 240.17a-8 must be kept for "not less than 3 years." *Id.* § 240-17a-4(b)(1).

Defendants attempt to blur the meaning of the above provisions by arguing that the term "cash" in 17 C.F.R. § 240.17a includes within its meaning both currency and check deposits. *See* Defendants' Memorandum at 38-40. Under this interpretation, the regulations do not require firms like Paine, Webber to create separate records for cash, as opposed to check, deposits. Thus, defendants argue, because Paine, Webber was not required to

maintain separate listings for cash and check items, any alleged "miscoding" of cash deposits as check deposits was irrelevant and could not constitute a violation of the regulations. *Id.* at 39.

The Court agrees with the Government that this issue appears to be controlled by Sinclair v. *United States*, 444 F.2d 399 (2d Cir. 1971). In that case, the Second Circuit affirmed an SEC decision barring a clerk from the securities industry for violating § 17(a) of the Exchange Act. The court held that, "even assuming no legal obligation to furnish the names [of particular brokers who executed trades on required forms], there was an obligation, upon voluntarily supplying that information, to be truthful." *Id.* at 401. Thus, defendants' argument that Paine, Webber could misrepresent information about the nature and type of customer deposits without violating § 17(a) is unpersuasive. Furthermore, it is of no import that *Sinclair* was a civil case. At trial, the Government will be required to prove not merely that § 17(a) was violated by Paine, Webber, but also that the defendants "willfully" caused the firm to violate the statute and regulations thereunder. *See Heyman*, 794 F.2d at 792.

E. Obstruction of Justice Charges

Defendant Tota's last argument relates to the obstruction of justice object in the conspiracy count and the substantive obstruction of justice charge underlying count two of the indictment. Defendant Fahmy does not join Tota's motion to dismiss in this regard. Section 1503 of Title 18 provides for criminal penalties against anyone who attempts to impede or interfere with the work of a grand jury, or who "endeavors to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. § 1503. Tota is also charged as an aider and abettor under 18 U.S.C. § 2(b).

The indictment provides sufficient detail of the efforts allegedly made by Fahmy and Tota to cover the trail of the various transactions forming the basis for the indictment. These efforts included the destruction of cash summary folders, the miscoding of customer cash deposits as check deposits and the instructing of

Paine, Webber cashiers to hold back cash from a customer's account. Indictment ¶¶ 10(c), (e), (f) (g), 11(10)-11(17).

To survive a motion to dismiss, "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." United States v. *Tramunti*, 513 F.2d 1087, 1113 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *see* United States v. *Bagaric*, 706 F.2d 42, 61 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983) ("An indictment need only track the language of the statute."). Generally, an indictment will be upheld if it "(1) contains the elements of the offense charged; (2) fairly informs the defendant of the charge against which he must defend; and (3) enables him to plead an acquittal or conviction in bar of future prosecution for the same offense." United States v. Bank of New England, N.A., 640 F.Supp. at 39; *see* Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Sedlak, 720 F.2d 715, 719 (1st Cir. 1983), *cert. denied*, 465 U.S. 1037 (1984).

In the Court's view, the obstruction of justice object in count one and the substantive obstruction of justice charge in count two satisfy the above requirements. The means and overt act sections of the conspiracy count provide ample description of the particular allegations underlying the charges of obstruction of justice. In addition, count two adequately tracks the language of 18 U.S.C. § 1503. Accordingly, Tota's motion to dismiss the obstruction of justice allegations in the indictment is denied.

CONCLUSION

Defendants' motion to dismiss the indictment is denied. Fed. R. Crim. P. 12(b).

SO ORDERED.

.....

JOHN M. CANNELLA
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
September 29, 1987.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of April, one thousand nine hundred and eighty-eight.

Present: HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE JON O. NEWMAN,
HONORABLE ROGER J. MINER,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

GEORGE B. FAHMY,
Defendant-Appellant.

ORDER

George B. Fahmy appeals from a judgment of the District Court for the Southern District of New York (John M. Cannella, Judge), entered after a jury trial, convicting him of one count of conspiracy to defraud the United States, 18 U.S.C. § 371 (1982), and one count of obstructing justice, 18 U.S.C. § 1503 (1982). The conspiracy was alleged to have several illicit objectives including (1) causing Fahmy's employer, Paine Webber, Inc., not to file currency transaction reports on deposits of currency involving transactions of more than $10,000, in violation of 31 U.S.C. §§ 5313(a) and 5322 (1982 & Supp. III 1985) and 31 C.F.R. § 103.22 (1987), and (2) causing Paine Webber to fail to make and keep accurate records of its cash receipts, in violation of 15 U.S.C. §§ 78q(a) and 78ff (1982 & Supp. III 1985) and 17 C.F.R. §§ 240.17a-3 and 240.17a-8 (1987). The obstruction of justice count charged that Fahmy had participated in the destruction of Paine Webber records that he knew to be the subject of an

ongoing grand jury investigation. On appeal, Fahmy raises numerous challenges to the sufficiency of the evidence, jury instructions, and the conduct of the trial. We conclude that each of these contentions lacks merit.

1. *Conspiracy Count.* Fahmy was properly convicted of conspiring to cause Paine Webber to fail to file currency transaction reports. It is true that the regulations promulgated pursuant to 31 U.S.C. § 5313(a) impose reporting obligations only on certain financial institutions and not on individual employees or customers. *See United States* v. *Nersesian*, 824 F.2d 1294, 1310 (2d Cir.), *cert. denied*, 108 S. Ct. 357 (1987). Nevertheless, it is the settled law in this Circuit that by virtue of 18 U.S.C. § 2(b) (1982), which provides that one who willfully causes another to commit a crime, is punishable as a principal, the willful structuring of cash transactions by the employees or customers of a financial institution in order to avoid the filing of cash transaction reports constitutes a violation of 31 U.S.C. § 5313. *United States* v. *Heyman*, 794 F. 2d 788, 791 (2d Cir.), *cert. denied*, 107 S. Ct. 585 (1986); *United States* v. *Nersesian*, *supra*, 824 F.2d at 1311. Moreover, an agreement to cause the financial institution to fail to file such reports may be punished as a conspiracy to defraud the United States. *See United States* v. *Nersesian*, *supra*, 824 F.2d at 1310-13. With respect to Fahmy's claim that the statute gives inadequate notice that employees are covered, this Court has said that "the requirement of [18 U.S.C. §]2(b) that a defendant's acts be 'willfull' provides adequate protection for individuals who might unwittingly stumble into a violation of federal law." *United States* v. *Heyman*, *supra*, 794 F.2d at 792.

Fahmy was also properly convicted of conspiring to cause Paine Webber to fail to keep accurate records of its daily cash receipts. Fahmy argues that no violation could have been caused by his miscoding of cash receipts as check receipts because the applicable statute and regulations do not require brokers to differentiate between cash and checks. Whether or not the obligation to keep records as to "all receipts and disbursements of cash and all other

debits and credits," 17 C.F.R. § 240.17a-3, mandates differentiation between cash and checks, the false representation of cash receipts as check receipts violates the Securities Exchange Act. *See Sinclair* v. *SEC*, 444 F.2d 399. 401 (2d Cir. 1971) ("even assuming no legal obligation to furnish the names [of brokers] there was an obligation, upon voluntarily supplying that information, to be truthful"); *United States* v. *Sloan*, 389 F. Supp. 526, 528 (S.D.N.Y. 1975) ("The requirement that certain books and records be made clearly mandates that those records be made accurately and correctly"). Additionally, the trial court's jury charge in this regard properly stated that falsification of the cash records was illegal regardless of whether differentiation between cash and checks was required.

The evidence was sufficient to show an agreement to violate the reporting statutes listed in the indictment. There was testimony that Fahmy advised Gary Eder, a co-conspirator, that Fahmy was aware of Eder's practice of hiding customer cash deposits in excess of $10,000, and that Fahmy would endeavor to help Eder. Fahmy then instructed Paine Webber cashiers to tell Fahmy anytime one of Eder's clients wished to deposit cash in excess of $10,000. On at least one occasion, Fahmy informed Eder that he had received cash deposits which he believed triggered the reporting requirements but that he had withheld some of the money in order to avoid filing the required currency transaction report. With respect to the falsification of daily cash receipt records, Eder fully informed Fahmy of Eder's practice of listing large cash receipts as checks. Thereafter, Fahmy regularly instructed Paine Webber cashiers to miscode the customer receipt records and engaged with Eder in several concerted attempts to cover up the miscoding when it came to the attention of Paine Webber supervisors. This evidence was more than adequate to allow the jury to infer that a conspiracy had occurred. *See United States* v. *Young*, 745 F.2d 733, 762 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

2. *Obstruction of Justice.* The evidence was sufficient to establish Fahmy's participation in a conspiracy to violate 15

U.S.C. § 1503. Violation of that section requires "that there was a pending judicial proceeding, such as a grand jury proceeding, and that the defendant knew of and sought to influence, impede, or obstruct the judicial proceeding." *United States* v. *Capo*, 791 F.2d 1054, 1070 (2d Cir. 1986) (citations omitted), *overruled in part on other grounds*, 817 F.2d 947 (2d Cir. 1987) (in banc). The evidence showed that in 1984 a grand jury investigation was initiated regarding several individuals who had been depositing large amounts of cash at Paine Webber. Fahmy became aware of this investigation by virtue of subpoenas that were served on Paine Webber requesting documents related to these accounts. Additionally, Fahmy was informed by an officer of Irving Trust Co. that it too had received a subpoena regarding large cash transactions at Paine Webber. In October 1985 Fahmy read, discussed, and circulated to his colleagues a newspaper account of the guilty plea of one of the individuals who had been depositing cash at Paine Webber. The article quoted the United States Attorney as saying that the investigation was continuing. During this period, Fahmy told Eder that he was concerned that the investigation was starting to "heat up." Thereafter, in late 1985 or early 1986, Fahmy and Eder agreed to destroy certain miscoded cash receipt reports, and for this purpose they removed a shopping cart filled with the documents from Paine Webber's offices. Clearly, a jury could infer from the foregoing evidence that the co-conspirators agreed to destroy evidence with knowledge that the evidence was pertinent to an ongoing investigation.

Judge Cannella's jury charge regarding obstruction of justice properly instructed the jury on the element of intent. *See United States* v. *Moon*, 718 F.2d 1210, 1236 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984). The charge indicated that conviction required "the improper motive or purpose of obstructing the due administration of justice." Moreover, the jurors were instructed that the statutory requirement of "corrupt" intent could be found from "knowledge or notice that [defendant's] corrupt actions will obstruct justice which was then actually being administered." This language tracks virtually verbatim this

Court's discussion of 15 U.S.C. § 1503 in *United States* v. *Buffalano*, 727 F.2d 50, 54 (2d Cir. 1984). Because the instruction, taken as a whole, clearly informed the jury of the need to find an intentional obstruction of justice, the failure to use the precise words "specific intent" in the charge was not error. *Cf. United States* v. *Gregg*, 612 F.2d 43, 50 (2d Cir. 1979).

3. *Conduct of Trial.* Judge Cannella properly permitted the Government to reopen its case in order to prove that a grand jury had actually been impanelled at the time Paine Webber received the document subpoenas and when Fahmy committed his acts of obstruction. Under Fed. R. Evid. 611(a), the district court is vested with discretion to reopen the Government's case, even after the defense has rested. *United States* v. *Kanovsky*, 618 F.2d 229, 231 (2d Cir. 1980). In the present case, Judge Cannella merely allowed the Government to reopen its case shortly after the Government had rested and before the defense case had begun. The additional evidence was relevant Fahmy was not surprised, and Fahmy had a fair opportunity during the defense's case to meet the Government's additional proof. The Court's permission to reopen was within its discretion. *See United States* v. *Kanovsky*, *supra*, 618 F.2d at 231; *United States* v. *Blankenship*, 775 F.2d 735, 741 (6th Cir. 1985).

Judge Cannella's decision to excuse a sick juror after deliberations had begun and to proceed with an 11-member jury was proper. Fed. R. Crim. P. 23(b) expressly permits the court to excuse a juror "for just cause" and provides that a valid verdict may be returned by the remaining 11 jurors. Here, Judge Cannella acted well within his discretion because it was unclear whether the ill juror would ever be able to return. The defendant's proposed five-day adjournment would have risked dulling the remaining jurors' recollections of the trial, particularly since there had already been a three-day delay between the summations and the charge. *See United States* v. *Stratton*, 779 F.2d 820, 830-35 (2d Cir. 1985), *cert. denied*, 476 U.S. 1162 (1986).

The judgement of the District Court is affirmed.

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Circuit Judges.

N.B. This Summary Order will not be published in the Federal Reporter and Should not be cited or otherwise relied upon in unrelated cases before this or any other court.